

No. 14,804

IN THE
United States Court of Appeals
For the Ninth Circuit

PEGGY RAY WALKER KINGSTON,	}
vs.	
M. S. McGRATH,	
	<i>Appellant,</i>
	<i>Appellee.</i>

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This action was brought by appellant, a California resident, to recover damages allegedly resulting from medical malpractice in the diagnosis and treatment of critical neck and back injuries sustained by her in an automobile accident occurring in the State of Idaho. Appellee, a practicing physician and surgeon of that state, was the doctor in charge of her case during her subsequent hospital confinement. The trial was before a jury, and at the conclusion of appellant's evidence on the sixth trial day, the Court granted appellee's motion for a dismissal under Rule 41(b), Federal Rules of Civil Procedure, and rendered judgment for costs against appellant, from which judgment this appeal is prosecuted. There were other defendants, but this appeal is only as to the judgment in favor of the appellee, M. S. McGrath.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court: Original jurisdiction over this action was based solely upon diversity of citizenship and was conferred upon the trial Court by 28 U.S.C. Section 1332.

Jurisdiction of this Court to review the judgment upon appeal: 28 U.S.C. Section 1291 provides that the Court of Appeals shall have jurisdiction on appeals from all final decisions of the District Courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1294 provides, in part, that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the circuit embracing the district.

The pleadings necessary to show the existence of jurisdiction are the complaint (R. 2), the amendments thereto (R. 11 and 23) and the answer filed jointly by the appellee and other defendants (R. 18).

The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction to review the judgment in question on appeal have been heretofore alluded to, and will be given more detailed consideration in the following summary and statement of the case.

STATEMENT OF THE CASE.

The automobile mishap which caused the injuries for which appellant was hospitalized occurred on Sunday

morning, October 19, 1952, in the vicinity of Weiser. She was then a single woman in her late forties, and had for many years held a responsible position with one of the large retail stores in downtown San Francisco (R. 38-39). She was returning to California after a week's vacation in Idaho (R. 39) and was being driven by friends from Council to the airport at Boise (R. 40). The driver, in swerving to avoid other vehicles on the highway, drove the car onto a shoulder where it went out of control and overturned in an adjoining field (R. 42). Appellant was thrown out and was rendered unconscious. When she recovered her senses she was lying in the field in great pain and was unable to move her head. She was later taken by ambulance to the nearby Weiser Memorial Hospital (R. 43).

Dr. McGrath was already at the hospital when the ambulance arrived (R. 118). The hospital had a fully equipped X-ray department (R. 120-121) and he had the injured lady carried directly to this room. A technician employed by the hospital took X-ray films, under the doctor's direction, of her chest and ribs, and also two views of the cervical spine. The latter films were one taken from front to rear (anterior-posterior), and also a lateral view (R. 119).

She was then moved to a private room and was in a state of shock for three or four hours following her hospital admission (R. 123). She complained of excruciating pain in her neck, radiating up into the back of the head, and rib injuries were also suspected (R. 118). It was the doctor's impression that she

probably had a neck fracture (R. 121). He endeavored at the beginning of her hospital stay to place her in a neck brace or harness that he had lying in his office (R. 122). This caused her such intense pain, however, that it was impossible to apply it (R. 47).

It was the practice at the hospital to send X-ray films to an outside radiologist for analysis and interpretation. The X-rays initially taken at the hospital were sent to the offices of Dr. Judson V. Morris, a radiologist in Boise. His report was received some four or five days later (R. 128). It was negative with reference to the films taken of the cervical spine. An anomaly in connection with the sixth thoracic or dorsal spine was noted in the report concerning the film of the chest and ribs, however (R. 131). This was referred to in the report as follows:

“About the mid-point of the thoracic spine there is a mild scoliotic list toward the right side. This appears secondary to asymmetry in vertical dimension in its right portion. *This could be congenital but possibility of injury is not ruled out.*”

In the impression given at the conclusion of the report, the examiner again referred to the evidence of lack of symmetry in the vertebræ at this level, and stated that “this could easily be congenital but *possibility of compression injury is not ruled out.*”

Despite this report, no further attempt to use the X-ray as an aid to diagnosis was made until November 5th. At this time, a lateral view of the thoracic spine was procured, again under the direction of Dr. McGrath (R. 138). This was the only film that

was taken, and no films of the cervical region were requested on this occasion. Another radiologist, Dr. Norman Bolker, of Nampa, who did most of the work for the hospital, examined this film the following day while he was there on one of his regular weekly visits (R. 139). His reading resulted in a positive finding that there was a *compression fracture of the body of the sixth dorsal vertebra* "with anterior wedging so that the anterior width is approximately one-fourth the posterior." He also found that the picture revealed that there was kyphosis, or forward angulation, centered at the point of the compression fracture (R. 145).

With this X-ray evidence of a broken back, the patient was then immediately placed in hyperextension, with her back arched forward, for several days, and she was later strapped in a body brace (R. 147). In the meantime nothing whatever was being done about her neck complaints. Notwithstanding the constant agony that this injury was causing, she was allowed to suffer for an entire month without anything being done in the way of treatment or further diagnosis in so far as the injury was concerned.

Dr. McGrath finally decided on November 18th to have further X-rays of the upper spine taken. This was a series of six films of the skull and cervical vertebrae (R. 332-33) and were likewise read by Dr. Bolker (R. 149-153). These X-rays were taken because of "increase in pain" in the patient's neck and back of her head (R. 151). This was the first time that any X-rays of her neck were taken since the initial X-rays

on October 19th. There were findings in the radiologist's report rendered on this occasion of a bony pathology in the first cervical vertebra. The report pointed out that what appeared to be defects in the laminae of the dorsal arch seemed to be "developmental in origin," however, and "it is believed that the odontoid process* is intact but section view of the neck and lateral projection will be retaken to verify this conclusion" (R. 153).

On November 20th a final series of X-rays, consisting of four lateral views of the neck was taken and shown to Dr. Bolker. These X-rays, according to his report which was received by Dr. McGrath on November 26th, revealed that appellant had, in fact, suffered multiple fractures of the upper cervical vertebrae. The report concluded with the following impressions:

"Fracture of odontoid process of second cervical vertebrae (sic), with posterior displacement of the process, with several fractures in the laminae (sic) of the first cervical vertebrae (sic). A previous lateral view of the neck taken with the neck in extension produced a reduction of this dislocation fracture so that it was not apparent on examination of 10/19/52." (R. 156.)

On November 25th, the day before Dr. McGrath received the X-ray confirmation of the crucial nature of the neck injuries suffered by appellant, he had already contacted Dr. Burton, an orthopedic physi-

*The odontoid process is a bony projection upward from the second cervical vertebra which articulates with the atlas, and upon which it rotates.

cian and surgeon practicing in Boise, to arrange for a consultation with him at the Weiser Hospital on the following day (R. 165-166). The X-ray report was on hand when Dr. Burton arrived the next day, and he informed the patient in the presence of Dr. McGrath as to the seriousness of the situation.

A full body cast which held the entire neck, back and spine rigid was prepared and was applied by Doctors Burton and McGrath on November 30th (R. 168-170).

On December 5th, her 47th day at the Weiser Memorial Hospital, she was discharged as "unimproved" and taken by train under the care of a nurse to Notre Dame Hospital in San Francisco (R. 65). The final diagnosis entered in the records of the Idaho hospital was "fracture first and second cervical vertebrae—fracture sixth dorsal vertebrae (sic) (compression)—multiple bruises and abrasions" (Pltfs. Exh. 1).

Upon her arrival at Notre Dame Hospital appellant was placed under the care of her family doctor, Dr. James Clifford Long, and Dr. John J. Loutzenheiser, an orthopedic specialist (R. 70).

Dr. Loutzenheiser's testimony was produced at the trial in the form of a deposition. He testified that the fractures at both levels were demonstrated by X-rays taken at the time of her admission to the Notre Dame Hospital, and that a dislocation of some 15 degrees was found in the fracture of the odontoid process (R. 166).

The patient was immediately placed in traction in an endeavor to straighten out her spine. An attempt was also made to gradually extend her thoracic spine in order to overcome the compression. There was some success in the treatment of the cervical spine, but because of the time that had elapsed since the injury nothing could be done to bring about any improvement in the thoracic spine (R. 370-371). There was also considerable nerve root damage due to the compression at the level of the thoracic spinal injury which caused intense pain radiating up into the patient's chest (R. 373-375).

She left Notre Dame Hospital on February 1st and was last seen by Dr. Loutzenheiser in September of 1953. There had been no change in a period of over six months, and the doctor regarded the disabilities that she then had as being permanent in character (R. 376-377). It was his opinion, moreover, that additional disturbances could be expected to recur in the lumbar spine at a later date because of the alteration of body mechanics resulting from her injuries (R. 377).

Appellant has been left with a badly deformed and painful back, and has difficulty in rotating her neck (R. 377, 408-409, 449). Her activities are very restricted and she has never been able to return to her employment (R. 73). Thirteen months after her accident she was married to Norman J. Kingston, a sergeant in the U. S. Air Force, and now resides with her husband in Merced, California. She testified, how-

ever: "I am still not a wife to the man. I am hoping for the day I will be able to be" (R. 104).

Commencing on the evening of her fourth day in the Weiser Memorial Hospital, plaintiff went through a period of several days during which she was mentally disoriented and confused. We mention this because Dr. McGrath testified that, on the basis of his experience as county physician with common drunks in the county jail, he believed that this lady was at the time suffering from delirium tremens (R. 228). We submit that there is absolutely no evidence in this case to support this odious slur, and if there was a semblance of truth to this insinuation it would not even constitute the slightest excuse for neglect on the part of a doctor in furnishing his patient with proper medical care.

In addition to her own testimony, appellant relied on testimony coming from the following witnesses: Dr. M. S. McGrath and Dr. Judson B. Morris, both of whom were called under Rule 43(b), Federal Rules of Civil Procedure; Dr. Robert M. Coats, a physician and surgeon on the staff of the Weiser Memorial Hospital; Dr. John J. Loutzenheiser of San Francisco; Mrs. Sidney Cox, her twin sister, who came from Fairbanks, Alaska, to testify on her behalf; and her son, Gardner P. Wood. Other pertinent facts shown by the testimony of these witnesses will be discussed and correlated to the points to be covered by the argument which follows.

Appellant rested at the completion of her case and defendant thereupon presented his motion to dismiss on various grounds, all essentially based upon the alleged insufficiency of the evidence (R. 450-453). The Court granted the motion after hearing oral argument. Thereafter, appellant moved for leave to reopen her case as to appellee, M. S. McGrath, for the purpose of offering further evidence, and for reconsideration of the order granting the motion to dismiss as to him, both of which motions were denied (R. 453-456).

SPECIFICATION OF ERRORS.

Specification No. 1.

The Court erred in its order granting the motion of the defendant, M. S. McGrath, under Rule 41(b), Federal Rules of Civil Procedure, for dismissal after the evidence had been presented on behalf of plaintiff, and in rendering judgment in favor of said defendant thereon.

Specification No. 2.

The order and judgment appealed from are contrary to law and the evidence.

Specification No. 3.

The Court erred in denying plaintiff's motion to reopen the case and for reconsideration of the order for dismissal of the action as to the defendant M. S. McGrath.

Specification No. 4.

In rendering its order and judgment for dismissal as to said defendant, M. S. McGrath, the Court invaded the province of the jury.

Specification No. 5.

Plaintiff was denied her right to a trial by jury under the Seventh Amendment to the Constitution and Rule 38(a), Federal Rules of Civil Procedure.

ARGUMENT.

A. ON APPEAL FROM AN INVOLUNTARY DISMISSAL OR NON-SUIT AT THE CONCLUSION OF PLAINTIFF'S CASE, THE PLAINTIFF IS ENTITLED TO THE MOST FAVORABLE INFERENCES DEDUCIBLE FROM THE EVIDENCE, AND SINCE THERE WAS VERY SUBSTANTIAL EVIDENCE FROM WHICH THE JURY COULD HAVE FOUND THE APPELLEE GUILTY OF MALPRACTICE, THE DISTRICT COURT ERRED IN GRANTING THE MOTION.

On a motion to dismiss by the defendant after the plaintiff has completed the presentation of his evidence in a jury case, the Court must consider all the evidence *in the light most favorable to the plaintiff* and may grant the motion only if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff. This rule is necessary to keep the right to a jury trial inviolate.

Jacob v. City of New York (1942), 315 U.S. 752, 62 S.Ct. 854;

Moran v. Pittsburgh-Des Moines Steel Co., CCA 3 (1948), 166 F. 2d 908, certiorari denied 334 U.S. 846, 68 S.Ct. 1516;

Weintraub v. Rosen, CCA 7 (1938), 93 F. 2d 544;

5 *Moore's Federal Practice* (2d Ed., 1948), § 41.13[4].

For purposes of this review, conflicts must therefore be ignored, and the evidence, with all reasonable inferences resulting therefrom, must be regarded in the light most favorable to appellant's contentions. When so considered, we earnestly believe that it must manifestly appear that appellant was entitled to have the jury pass upon the issues as to malpractice in this case.

Without repeating facts already presented, the following is a brief summary of some of the additional testimony that would seem to lead inevitably to this conclusion.

Appellant, as a witness on her own behalf, testified that the greatest pain that she suffered upon her admission to the hospital was in her neck and chest (R. 45-46); "I had to pick my head up to move it from one spot on the pillow to the other"; that on the first night of her hospitalization Dr. McGrath attempted to put some kind of apparatus over her neck, but that "it hurt me so bad all I did was scream and scream" (R. 27); "that every time I told Dr. McGrath, 'Dr. McGrath, my neck, I can't stand it' he said to me, 'Those are bruises and when bruises come to the surface they hurt worse'" (R. 48); that on the second hospital day she was told that she could walk around the bed or go to the bathroom, and that

she could leave the hospital as soon as she was able to walk (R. 46); that she was wrapped in Ace bandages for the suspected rib injuries, but that nothing whatever was done for her neck and back (R. 48); that on the third or fourth day she was told by the doctor that "as soon as I could walk I could go down to a hotel in Weiser, rest there, and then I could go on home"; that for "weeks and weeks" she "tried to walk around the bed and I would hold my head"; that after four or five days "I sort of went out of my mind" (R. 50); that after she came out of her delirium "my neck kept getting worse every day" and that she kept the doctor continuously informed as to her complaints; that she futilely suggested to the doctor that "two heads" might be better than one (R. 53); that the doctor finally told her that she had a broken back and had her immediately placed in hyper-extension (R. 59); that after the back brace was applied she was told: "you have got to walk every day to get your strength and learn to walk in this back brace"; that she continued to complain constantly about her neck (R. 60) and that "my head wouldn't go down like this. It hurts too bad and I had to hold it all the time" (R. 61); that after weeks of torture Dr. Burton finally arrived and said "You are walking around with a broken neck and a broken back"; that Dr. Burton said to her: "You don't realize it, but if you would sneeze you would paralyze yourself from the neck down" (R. 64); that after being placed in the body cast she was transferred to the Notre Dame Hospital in San Francisco, and that after leaving that

hospital she continued to wear a back brace for two and one-half to three months, and a neck brace for another four or five months (R. 71).

Dr. M. S. McGrath, called as a witness under Rule 43(b), testified that he had been a licensed physician and surgeon for 17 years (R. 111); that he was one of the five regular members of the medical staff of the Weiser Hospital (R. 113); that he was in general practice and treated fractures, but that ordinarily he would refer known spinal fractures to a specialist (R. 116, 158); that he was only familiar with one textbook on the subject of orthopedics (R. 252-253); that upon his first examination of the patient, he suspected neck injuries, and also possible injuries to the fifth and sixth ribs on the left side (R. 118); that the patient "was having very severe pain in her neck, radiating up her neck into the back of the head" (R. 118-119) and that she also had pains in the left side of her chest (R. 121); that "I suspected she probably had a fracture" (R. 124); that she was kept under drugs and sedatives because of her intense pain (R. 122, 186, 246, 247); that he did nothing to immobilize her injured neck after suggesting that she wear a neck brace (R. 134); that he knew that immobilization of the injured area was important in treatment of neck injuries (R. 159); that the usual symptoms of a neck fracture were "pain, may have instability of the head, may not be in proper position, or may not be angulation or asymmetry" (R. 164); that when he received the negative X-ray he began to feel that she "possibly didn't have a fracture in the cervical region" (R. 142);

that even if X-rays are negative, a physician should still treat the patient's symptoms (R. 165); that the longer fractures of the spine remain untreated, the greater the damage that should be expected (R. 250).

Dr. Robert A. Coats testified that he was a physician and surgeon on the medical staff of the Weiser Memorial Hospital; that he was familiar with the usual standards of practice maintained in the hospital (R. 286); that the X-ray is not an infallible aid to diagnosis, and the first X-rays do not invariably reveal existing fractures (R. 287, 301); that if a suspected fracture is not disclosed by the initial X-rays, more films should be taken (R. 301); that a delay of weeks in treatment would materially affect the degree of recovery from spinal injuries of the kind here involved (R. 308-309).

Dr. Judson B. Morris, called under Rule 43(b), testified that since X-ray films are on three planes, superimposed on each other, there are many problems in X-ray technique that often affect the accuracy of the result; that there are many factors, including positioning and technique, which may affect the value of the radiograph as an aid to diagnosis (R. 319-320); that the probable reason why the fracture of the odontoid process could not be seen in the X-rays taken on October 19th was due to the position in which they were taken (R. 330).

Mrs. Sidney Cox testified that she learned of her sister's accident on October 21st (R. 387); that she immediately left Bend, Oregon, where she was then

living, and arrived at the hospital the following Wednesday (R. 389); that she found her sister holding her head and "complaining terribly about her neck" (R. 388); that she was told, however, that her sister only had broken ribs, and that there was nothing to worry about, so that she returned to Bend the same night (R. 388); that she received a phone call from the hospital after she arrived home, however, and immediately returned to the hospital, arriving Friday at about 1:00 A.M. (R. 393); that, on this occasion her sister talked strangely, and, at times, incoherently (R. 393-394); that she still held her neck and complained of pain (R. 395); that in a private conversation with the doctor while she was visiting her sister, she told him that "I am terribly worried about my sister, don't you think it might be well if we could call another doctor in?" but that he replied that there was "nothing to worry about" (R. 396); that she saw her sister the following Saturday morning, and that she had fully recovered from her hallucinations (R. 397); that Dr. McGrath again came into the room while she was there and stated: "Your sister is all right now" (R. 398); that her sister continued to complain about her neck, however, "It was her neck, her neck, and every minute, 'Sidney, it is my neck, something is wrong' " (R. 397); that she stayed with her sister until Saturday night, when she again returned to Oregon (R. 398); that her next visit to the hospital was at Thanksgiving time, when she was accompanied by appellant's son (R. 398); that they then learned that it had been finally determined that she

had a broken neck (R. 398-399); that before her hospitalization, her sister was very straight, but that she now has a "fearful hump" in her back; that she is "very, very bent, very curved and that there are some bones protruding" (R. 409).

Gardner P. Wood testified that he was the son of the appellant and was 24 years of age (R. 430); that at the time of the accident he was in the military service and was stationed in Okinawa; that he learned of his mother's accident and injuries on November 10th after returning from overseas (R. 434); that he immediately contacted Dr. McGrath by telephone and was told that his mother had a broken back, but that she was in a brace and walking every day, and that there was nothing to be alarmed about (R. 434-435); that he arranged a furlough and arrived in Weiser for a two-day visit with his mother on or about November 18th or 19th (R. 432); that he found her in great pain, complaining of her head, and crying (R. 433); that he had a further conversation with Dr. McGrath at the hospital and stated to the doctor: "Dr. McGrath, don't you think it advisable to get another doctor, just look at my mother, I don't like the looks of her" (R. 436); that he next visited with his mother on November 26th, the day before Thanksgiving (R. 436); that it was then that they learned that she had a broken neck as well as a broken back (R. 437).

In considering this testimony, it must be borne in mind that this is a case in which a patient with a broken back received no treatment for this condition until she had been in the hospital for *18 days*, although

her doctor received an X-ray report a few days after he assumed responsibility for her care indicating that there was a possibility of compression injury; a case of a lady with a broken neck which was not discovered or treated in any way until her *39th hospital day*, despite the fact, as shown by the evidence, that from the time that she was first admitted she had constant symptoms and complaints indicating the presence of serious injury in that area.

From the foregoing testimony, there was ample evidence from which the jury could have found the appellee guilty of malpractice on each and all of the following theories:

(a) Failure to exercise due care and skill in making his diagnosis of appellant's injuries, and in not making proper use of available X-ray equipment and other diagnostic facilities.

(b) Negligence in the care and treatment of appellant's known injuries, and in failing to immobilize her or otherwise protect her from further aggravation of her injuries until a more definite diagnosis could be made.

(c) Negligence and breach of duty in failing to inform appellant as to the serious character of her injuries, and in failing to suggest consultation with an orthopedist.

There was not only strong evidentiary support for each of these theories of recovery, but they are all sustainable under the authorities, to which we now turn for analysis.

B. IT IS THE DUTY OF A PHYSICIAN AND SURGEON TO USE REASONABLE CARE AND SKILL IN DIAGNOSIS AND TO MAKE PROPER USE OF AVAILABLE DIAGNOSTIC AIDS FOR THIS PURPOSE.

There is a fundamental difference in malpractice cases between mere errors of judgment and negligence or lack of skill on the part of a physician and surgeon in diagnosis and treatment. The rule of immunity based upon "error of judgment" does not apply if the physician and surgeon does not exercise due care in making his diagnosis, or if he is negligent in assembling data essential to a proper discharge of his duties in that regard. The foregoing rule of sound medical practice is universally recognized and may be stated by way of general application in the following language from the law encyclopedias:

"It is one of the fundamental duties of a physician to make a proper skilful and careful diagnosis of the ailment of a patient, and *if he fails to bring to that diagnosis the proper degree of skill or care, and makes an incorrect diagnosis, he may be held liable to the patient for the damage thus caused just as readily as he must answer for the application of improper treatment.*" (Emphasis added.)

41 Am. Jur. 209; Physicians and Surgeons, §92, Diagnosis.

"Although generally malpractice arises because of the negligent conduct of a physician, it is not necessarily limited to acts of negligence, but may result from lack of skill or neglect to apply it, and such neglect or lack of skill may be applied to

a single act, or any *entire course of treatment*.”
(Emphasis added.)

70 C.J.S. 954; Physicians and Surgeons, §40,
Negligence and Malpractice, Definitions.

These principles were recognized and followed by the Idaho Supreme Court long ago in the leading case of *McAlinden v. St. Marie's Hospital* (1916), 28 Idaho 657, 156 P. 115. The plaintiff there suffered comminuted fractures of the bones of the right leg in a logging accident. While he was under the care of the defendants he developed a gangrene in the injured limb, and his leg was amputated. He claimed that this was due to negligence in his treatment and care, and was awarded a judgment following a trial by a jury.

In holding that the trial Court had properly denied the defendants' motion for a nonsuit and for a directed verdict, the Idaho Supreme Court said, at page 675:

“And in 30 Cyc 1578, note 92, and case cited, the following rule is laid down: ‘Whether errors of judgment will or will not make a physician liable in a given case depends not merely upon the fact that he may be ordinarily skilful as such, but *whether he has treated the case skilfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession*.

“As is stated in the case of *MacKenzie v. Carman*, 92 N.Y.Supp. 1063: ‘The law thus requires the surgeon to possess the skill and learning which is possessed by the average member of the medical profession in good standing, *and to apply that skill and learning with ordinary and reasonable care*.

“Whether the appellant’s physician and surgeon possessed and exercised that degree of skill and learning possessed by the average member of the medical and surgical professions in good standing in the community, and used that reasonable care and diligence according to his best judgment in treating respondent’s injured limb that the average member of the profession would have used, are *questions of fact* exclusively for the jury to determine.” (Emphasis added.)

A later expression of the policy of the Idaho courts with regard to the duties and responsibilities of physicians and surgeons may be found in the frequently cited case of *Flock v. J. C. Palumbo Fruit Co.* (1941), 63 Idaho 220, 118 P. 2d 707. There, the Court stated:

“The measure of responsibility for care, treatment, hospitalization, etc., resting upon appellant contract physician under this contract is at least equal to that resting upon a physician and surgeon in the exercise generally of his profession. That standard has been fixed by this court, under both sections 43-1107 and 43-1108, as the exercise of the care and skill ordinarily exercised by competent physicians and surgeons in the same or like locality, *in the light of present day learning and scientific knowledge of, and professional advancement in the subject.*” (Citing numerous authorities, including *McAlinden v. St. Marie’s Hospital Assn.*, *supra.*) (Emphasis added.)

The Idaho Court, in arriving at its decision in the *Flock* case, places particular emphasis on and quotes extensively from the North Dakota decision in *Tevedt*

v. Haugen (1940), 70 N.D. 338; 294 N.W. 183. In the *Tevedt* case, the Court held that a doctor who does not have the facilities or training to properly treat fractures, but who knows that treatment by a specialist would be more likely to be successful, is under a duty to advise his patients of these facts. The following pertinent language is from the opinion of the North Dakota Court.

“* * * According to the evidence the defendant recognized at once when he was informed of plaintiff’s consultation with Dr. Oppegardst at Crookston, that the situation required the services of a bone specialist, but *he had never called this to the attention of the plaintiff before*. See, *Beardsley v. Ewing*, 49 N.D. 373, 382, 383, 168 N.W. 791, 793, 794. The duty of a doctor to his patient is measured by conditions as they exist, and not by what they have been in the past or may be in the future. Today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and *the duty of a doctor is not fulfilled merely by utilizing the means at hand* in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have, in effect, been extended so as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of limited facilities or training, is unable to give.” (Emphasis added.)

The Federal case cited in another connection above (*Weintraub v. Rosen*, 93 F. 2d 544, *supra*) presents facts that are very much in point here. That case

originated in the United States District Court in Illinois. The plaintiff was brought to a hospital in Springfield after an automobile accident in which she suffered serious injuries, including a skull fracture which endangered her life for several days. She also suffered a fractured hip, but this was not diagnosed until after she was discharged from the hospital about a month later.

The District Court directed a verdict in favor of the attending physician, on the theory that his first duty was to save the patient's life, if possible, and that examination or treatment of her hip while she was in the hospital suffering from injuries of more immediate severity would have added to the danger. In reversing this judgment, the Circuit Court held that the facts were sufficient to establish a *prima facie* case of negligence with respect to the injury to the hip, and that *the burden shifted to her physicians to show a proper excuse for their failure to make a further examination or diagnosis*. The following statement is from page 547 of its opinion:

“Aside from the injury to the patient's head there can be no doubt that appellants established a *prima facie* case of negligence, with proximately resulting damages. It may be conceded that the injury to her head prevented an examination and treatment of her hip sooner than five days after the injury. However, this record discloses that the patient was in a condition to undergo an examination of her hip when she regained consciousness.

* * * * *

“We may safely assume from the evidence, therefore, that appellees were negligent in not

observing the condition of the patient's hip. *They owed her the duty of making such examination and giving her such treatment as her physical condition and the skill of their profession in that community warranted. They did nothing so far as the injury to her hip was concerned either in the way of curative or palliative measures. This fact speaks loudly in support of appellants' contention that they made no examination and had no knowledge of the fracture. To conclude otherwise would be unjust to appellees.*" (Emphasis added.)

C. FAILURE OF A PHYSICIAN AND SURGEON TO MAKE PROPER USE OF X-RAY FACILITIES AS AN AID IN DIAGNOSIS IN CASES OF DOUBT, RENDERS HIM RESPONSIBLE TO THE PATIENT FOR ALL INJURIES AND DAMAGE RESULTING THEREFROM.

Failure by a physician and surgeon to make adequate use of X-ray equipment as an aid to diagnosis of bone and other injuries has been held actionable in every jurisdiction in which the point has been the subject of judicial review. The leading case on the subject is, perhaps, the California decision in *Reynolds v. Struble* (1933), 128 C.A. 716; 18 P. 2d 690. The appeal was from a judgment in favor of the plaintiff, a structural steel worker who injured his left arm and received other injuries as the result of a fall. He was taken to a hospital and his attending physician *immediately had X-rays taken of the injured area*. After studying the X-rays, notwithstanding the fact that the patient complained of great pain in his

arm and protested when the doctor manipulated it, the physician assured him that he had no fractured bones. He was discharged from the hospital a few days later with his arm still painful and disabled. Subsequently, it developed from an examination by someone else that he had multiple fractures involving the entire structure of the left shoulder and its inclusive processes. His arm was permanently injured by reason of the negligence in treatment, and a judgment in his favor was affirmed. *The original diagnosis made by the doctor was merely bruises and contusions and the plaintiff's only treatment while under the care of the defendant physician consisted of rest and general care.* The Appellate Court pointed out, in its opinion, that there was evidence that the X-rays taken when the patient was admitted to the hospital, if carefully examined, would have disclosed the fractures. After discussing this point, however, the opinion states:

“And it is likewise in the record, beyond dispute, that the exercise of ordinary skill and care such as possessed by physicians and surgeons practicing in that community would have required *further examination and the taking of further X-ray pictures* to determine the true condition of the patient. (P. 723.)

* * * * *

“There is further evidence that ordinary skill and care required the use of the X-ray as an essential aid to a skilful diagnosis, employing that skill and care possessed and used by the ordinary practitioner in that community. Indeed, it might be almost said that *the use of the X-ray as an aid to diagnosis, in cases of fracture or other indi-*

cated cases, is a matter of common knowledge. Even the layman, when injured, on his own accord seeks the X-ray. And under the rule of Jacobson v. Massachusetts, 197 U.S. 11 [25 Sup. Ct. Rep. 358, 49 L. Ed. 643, 3 Ann. Cas. 765], the court could, in the absence of testimony, take judicial notice of this scientific advancement.

“We have no hesitation in holding, under the evidence adduced, that there is sufficient in the record for the jury to have concluded that when the patient left the hospital, in the condition in which he was, that he was then *the victim of the unskilful diagnosis and that he had not received that skilful care which the doctor impliedly held out to him.*” (P. 725) (Emphasis added.)

The *Reynolds* case has been followed by a number of later decisions by the California Courts, in which there have been similar holdings. Among them are the following:

Lashley v. Koerber (1945), 26 C.2d 83, 156 P.2d 441;

Agnew v. City of Los Angeles (1947), 82 C.A.2d 616, 186 P.2d 450;

McBride v. Saylin (1936), 6 C.2d 134, 56 P.2d 941;

Burford v. Baker (1942), 53 C.A.2d 301, 127 P.2d 941;

Stanhope v. Los Angeles College of Chiropractic (1942), 54 C.A.2d 141, 128 P.2d 705.

This Court, in applying the domestic law of Idaho in *Moore v. Tremelling* (1938), C.C.A. 9, 100 F.2d

139, sustained a judgment for negligence in the treatment and diagnosis of a fractured femur, largely on the basis of evidence of failure to make adequate use of the X-ray as an aid to diagnosis.

The Ohio case of *Kuhn v. Banker* (1938), 133 Ohio St. 304, 13 N.E.2d 242, was among the authorities cited by the Idaho Supreme Court in *Flock v. J. C. Palumbo Fruit Co., supra*. There, X-ray films taken on the patient's arrival disclosed an intra-capsular fracture of the neck of the left femur. The fractured limb was placed in a splint and about 5 days later another X-ray picture was taken, which showed that the fracture had been reduced and that the shaft was in normal position. A few weeks later, still another X-ray was taken which showed a bony union with the parts in good position. The lady left the hospital about 10 days later, complaining of considerable pain in the leg, which was still in the splint. After some post-operative care, the physician finally told her to get up and walk, warning that if she did not she might have a stiff leg. The lady's complaints continued, however, and she complained of a grating in the injured area. However, the doctor did not advise further X-ray films and an X-ray examination at another hospital some time later disclosed that there was no bony union of the broken parts. The Appellate Court held that the circumstances disclosed by the evidence were sufficient to require the submission of the issue of the defendant's negligence to the jury, but the judgment of the trial Court, directing a verdict on other grounds, was affirmed.

Wilson v. Corbin (1950), 241 Ia. 500; 41 N.W.2d 702, is an Iowa decision in which the factual context before the court was very similar to that here involved. The plaintiff in that case suffered a fall in which he landed in a sitting position. The accident occurred on May 14, 1946, and he sustained a compression fracture of the third lumbar vertebra, although the injury was not correctly diagnosed until August 12, 1946. Plaintiff was taken to a hospital operated by the defendant doctor at Corydon, a small community, to ascertain the extent of his injury. It was contemplated that if there were any broken bones he would be taken to the State University Hospital in Iowa City, about 170 miles from Corydon. The next day an X-ray was taken of plaintiff's pelvis and the fourth and fifth lumbar vertebrae. This was a view from front to rear (anterior posterior). It did not include a view of the third lumbar vertebra. However, after receiving the X-ray report, the defendant doctor assured the injured man that there were no broken bones and that it was unnecessary for him to be taken to Iowa City. Plaintiff remained in defendant's hospital for 6 days and *no other X-rays were taken and no further examination was made*. This, although he constantly complained that the pain did not subside and he was unable to sit up at the time of leaving the hospital. At the close of plaintiff's evidence, a verdict was directed for defendant, mainly on the ground that plaintiff had failed to establish by expert testimony the standard of medical care applicable to Corydon or similar community, and that the negligence charged

as against defendant was not the proximate cause of plaintiff's damages. The following quotations are from the decision in which the Appellate Court reversed the trial tribunal:

"It has been repeatedly held that a physician's failure to take X-ray pictures, or have them taken, an aid to diagnosis when X-ray machines are available and commonly used by physicians in similar cases may be actionable negligence. (Citations.)

"...Indeed use of the X-ray as an aid to diagnosis of bone injuries has been held a matter of common knowledge. (Citations.) See also *Flock v. J. C. Palumbo Fruit Co.*, 63 Idaho 220, 118 P.2d, 707, 715." (Emphasis added.)

We conclude this part of our discussion with the following apt quotation from *Stagner v. Files* (1938), 182 Okla. 475; 78 P.2d 418, in which the Oklahoma Court affirmed a judgment for failure to make adequate use of X-ray in following up a shoulder injury:

"While it is true that the expert medical testimony introduced on behalf of the defendant tended to prove that it was not customary to make an X-ray picture to determine whether the joint was in place, and that the same was not usually necessary, yet, *there was evidence to the effect that this was the best method for such a determination and the defendant himself admitted that when there was any question about the existence of a dislocation, an X-ray picture should be made.* Since the testimony on behalf of the plaintiff tended to show that the defendant attended him during the intermediate period in question, and

that his shoulder was dislocated at that time and that the defendant did not discover it, we then must see if there was any evidence from which negligence on the part of the defendant could be inferred in failing to discover the dislocation then. *If, by the methods known to him, he could have discovered the dislocation, then he was negligent in failing to use such methods.* The chiropractor testified that from an examination she found the shoulder to be dislocated. *If the circumstances were such as to create any doubt as to whether or not the shoulder was in place during the period complained of, then, according to his own testimony, the defendant was negligent in having failed to take an X-ray picture of the joint."* (Emphasis added.)

D. WHERE MALPRACTICE IS ALLEGED AND PROVED IN CONNECTION WITH THE TREATMENT OF INJURIES RECEIVED IN AN ACCIDENT, THE BURDEN IS ON THE DEFENDANT TO LIMIT THE RECOVERY BY SHOWING THE EXTENT TO WHICH THE CONDITION COMPLAINED OF IS ATTRIBUTABLE TO THE PRIOR ACCIDENT.

Defense counsel frequently claims that the plaintiffs have the burden of proving what portion of their alleged damage was due to the original ailment, and what portion to the alleged negligence, and that failing so to do, they cannot recover. Such is not the law. The injured party establishes a prima facie case when he has shown that there is a probability that there was an aggravation of his original injuries due to malpractice. The burden then shifts to the defendant to show the extent to which damages may be

attributal to circumstances other than the bad results. The correct rule is, as succinctly stated in the case of *McCormick v. Jones*, 152 Wash. 502; 278 Pac. 181, as follows:

“Negligence having been established from which bad results would naturally follow, *the burden is on the respondent (doctor) to limit the recovery* by showing that the pain and suffering were the result of intervening causes.” (Emphasis added.)

The California Supreme Court pointed out in this connection in the case of *Ash v. Mortensen* (1944), 24 C.2d 654; 150 P.2d 856, that since an injured party is not ordinarily entitled to a double recovery from both the driver and the doctor where he has been negligently treated for injuries received in an automobile accident, the medical practitioner has “*the right to show what damage, if any, was actually suffered by reason of malpractice*” and to have the jury’s award limited to such damages in the malpractice suit.

We also quote the following rather pertinent language on the subject of proof of damages from *Stagner v. Files*, supra:

“The defense counsel further asserts that even though it were admitted that the evidence was sufficient to show that the defendant was negligent, there was absolutely no evidence whereby the jury could say whether the condition of the plaintiff’s arm was due to the character of the original injury or to the defendant’s lack of skill and care in treating it. This contention does not

take into consideration the undisputed fact that the condition of the dislocated shoulder was aggravated by neglect or failure to relocate it and allowing it to remain dislocated over a period of months, and that *the plaintiff's chance of permanent absolute recovery was thereby greatly decreased. It also overlooks the prolonged suffering which such neglect caused. It is true that the condition of plaintiff's shoulder is not entirely due to neglect and lack of care in its treatment, but it cannot be and is not denied that said condition was aggravated thereby and that the plaintiff suffered a definite detriment from same. While it is true that there was no evidence introduced which would enable the jury to approach mathematical accuracy in the determination of just how much worse the condition of the plaintiff's shoulder was rendered by the defendant's negligence, yet, as the evidence discloses that some change in it was thereby created to the plaintiff's detriment accompanied by the prolongation of his pain and suffering, his recovery is not defeated by the impossibility of accurately measuring such detriment. It is fundamental that when the cause and existence of damages is established with certainty, recovery thereof will not be denied because of difficulty in determining their exact amount.*" (Emphasis added.)

In *Reinhold v. Spencer* (1933), 53 Idaho 688, 700; 26 P.2d 796, where it was contended in a malpractice suit that there was no competent evidence to show "that respondent suffered damage by reason of any act of negligence on appellant's part," and that the trial Court should have granted a non-suit or motion

for a directed verdict, the reviewing Court replied as follows:

“Damages, if any, flowing from an injury such as respondent sustained, that is, for pain and suffering and loss of income due to the particular injury, are susceptible to proof *only with an approximation of certainty*, and it is solely for the jury to estimate them as best they can by reasonable probabilities based upon their sound judgment as to what would be just and proper under all of the circumstances, which may not be disturbed in the absence of some showing that the jury were biased or prejudiced or arrived at the amount in some irregular manner.” (Citing cases.) (Emphasis added.)

Similar expression may be found in many of the decisions cited above, including the *Moore*, *Weintraub*, and *Wilson* cases.

CONCLUSION.

In holding that the trial Court in that case had usurped the functions of the jury in granting a motion to dismiss at the close of plaintiff's case, the Supreme Court of the United States in *Jacob v. City of New York* (1942), 315 U.S. 752, 62 S.Ct. 854, *supra*, prefaced its opinion with the following statement:

“The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether

guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.”

The questions presented by the evidence in this case definitely should have been submitted to the jury for determination under proper instructions. Appellant's constitutional right to trial by jury has been abrogated as a result of the judgment and orders appealed from. The judgment should therefore be reversed.

Dated, San Francisco, California,
November 1, 1955.

Respectfully submitted,
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